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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 482

A. J. PARETTA CONTRACTING CO., INC.,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

EMANUEL HARRIS,
Counsel for Petitioner.

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No. 482

A. J. PARETTA CONTRACTING CO., INC.,
Petitioner,

against

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The petition of A. J. Paretta Contracting Co., Inc., respectfully shows to this Court:

This is a petition for a Writ of Certiorari to the Court of Claims of the United States.

On October 6, 1947, the Court of Claims denied recovery upon two items of petitioner's claims for additional compensation under contracts with the United States for the Construction of housing. This petition is to review such denial. Judgment was granted to petitioner in the sum of $2,659.47 upon one item of petitioner's claim not involved in this petition (R. 55).

Jurisdiction

The jurisdiction of this Court is invoked to review a judgment of the Court of Claims.[1]

[1] 53 Stat. 752; U. S. C. 28:288.

Statement of the Matters Involved

Petitioner entered into two contracts with the National Housing Agency, Federal Public Authority, for construction at Massena, New York, of housing (R. 26). The first contract (30082) was executed on June 9, 1942. The second contract (30083) was executed on December 2, 1942 (R. 27).

I

The first item of petitioner's claim denied by the Court of Claims relates to increased wage rates paid by petitioner above the minimum rates specified in contract 30083, as determined by the Secretary of Labor under the Bacon-Davis Act [2] (R. 35), and stabilized by the Stabilization Act [3] and Executive Order 9250.[4]

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[2] 49 Stat. 1011; 54 Stat. 399; U. S. C. 40:276a.

"Rate of Wages for Laborers and Mechanics. The advertised specifications for every contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there."

[3] 56 Stat. 765; U. S. C. App. 50:43.

"Sec. 1. In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before Novembere 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. . . ."

[4] October 3, 1942.

"1. No increases in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or other-

The determination of the Secretary of War as to the wage rate for carpenters of $1.25 per hour was made on August 10, 1942 (R. 35). The Court of Claims found that petitioner used the basic wage rates set forth in the specifications in computing its bid (R. 30). Subsequent to the execution of the contract, carpenters on the project refused to work at the rate of $1.25 per hour specified in the contract (R. 30-31). The Secretary of Labor thereupon modified the determination of the prevailing rate for carpenters made on August 10, 1942, and substituted $1.35 for $1.25 (R. 35). As a result of such modification, petitioner paid $3,662.30 more for the wages of carpenters than it would have paid under the rate specified in the contract. Petitioner made claim for this amount in the Court of Claims (R. 36).

The Court of Claims held that under the contract provisions, changes in the determination of the prevailing wages as made by the Secretary of Labor prior to the execution of the contract, were contemplated; that the Government did not warrant that $1.25 was the prevailing wage or would remain the prevailing wage; and that under the contract petitioner agreed to pay the wages based on determinations made after the execution of the contract (R. 50, 51).

The Court of Claims also held that the modification of the prior determination was made by the Secretary of Labor in response to petitioner's request for assistance in solving the dilemma created by the refusal of the carpenters to work for what the Secretary had determined was the prevailing wage and the prohibition of the Executive Order against the payment of higher wages, and that the modification of the

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wise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases."

prior determination was for petitioner's benefit, so that petitioner is estopped from asserting its claim (R. 51, 52).

The ruling of the Court of Claims was erroneous in its application of the provisions of the Bacon-Davis Act, under which the Secretary of Labor is under a duty to determine the prevailing wage prior to the execution of a contract, so that the wage rate as so determined may be set forth in the advertised specifications for the guidance of prospective bidders. Moreover, such ruling was erroneous in holding that the Secretary of Labor was authorized to change the wage rate subsequent to the execution of the contract, without compensation to the petitioner.

II

In anticipation of the construction under the second contract (30083) and in order to expedite it, the Government, on October 21, 1942, issued to petitioner Change Order #20 on the first contract (30082) providing for the construction of foundations, footings and piers for the housing included in Project 30083 (R. 26-27). The Change Order directed petitioner to furnish the material and labor for the excavation and back fill for all piers and all masonry work for the piers exclusive of any grading[5] (R. 40). It was anticipated that the foundations for Project 30083 could be completed before the cold weather set in and that work on the superstructures could go forward during cold weather (R. 41). By the end of December, 1942, petitioner completed the piers for 31 buildings and footings for one other

[5] The Change Order provision was as follows: (R. 40).

". . . furnish all material, labor and equipment necessary to entirely complete the excavation and backfill for all piers; concrete footings, including forms; all masonry work for foundation piers, including foundations for chimneys; anchors required in piers for floor girders; and engineering required to lay out foundations, all as shown on the drawings • • • for Project NY-30083 • • • exclusive of the stripping of top soil, general cut and fills, *or any grading.*"

building (R. 41). The work performed in the installation of the piers was in conformity with the specifications (R. 41). Little progress on the superstructures was made during the winter. The project engineer ordered work stopped because of the cold (R. 41).

The piers were inserted 3½ feet in the ground at the natural grade, which was later found to be lower than indicated on the plans (R. 42). In the absence of superstructures being placed on the piers, the only feasible method of protecting them against frost action would have been by placing earth around the piers (R. 42). If the grade had been indicated on the drawings, the piers would have had more protection (R. 42). The specifications provided that if the existing grades were lower than shown on plans, no fill need be provided (R. 42).[6]

Petitioner received notice to proceed on contract 30083 on December 7, 1942 (R. 41). During the winter, frost action in the ground tilted or toppled over 1,188 piers (R. 42). The Government requested petitioner to furnish a proposal for the adjustment of these piers (R. 43). Petitioner submitted its proposal in the sum of $11,500.93 for the realignment and adjustment of the piers (R. 43). The Government replied that the work was required under the contract and as such should be performed at no additional cost to the Government (R. 44). Petitioner demanded an equitable adjustment by reason of the necessity of restoring the piers to proper line and grade (R. 46) which was refused (R. 46). Petitioner completed the work of correcting the piers, the fair and reasonable price therefor being $11,500.93 as contained in petitioner's proposal (R. 46). Item III of petitioner's claim in the Court of Claims was for the recovery of said sum.

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[6] The specification was as follows:

"(f) Grade areas under buildings to levels shown on plans. If existing grades are lower, no fill need be provided."

The Court of Claims held that under the general provision of the contract [7] (30083) petitioner was responsible for the proper care and protection of the work against cold, and that petitioner under said contract provision should have taken the necessary precaution against the frost action to prevent the piers from getting out of alignment (R. 54-55).

The Court of Claims, in so ruling, gave no effect to the express exclusion of grading work in Change Order #20, nor to the specification in the contract that no fill need be provided if the existing grades were lower than shown on the plans, nor to its finding that the existing grades were lower than indicated on the plans, nor to its finding that the only feasible method of protecting the piers against frost action would have been by grading (placing earth around the piers), nor to its finding that if the grade had been as indicated on the drawings, the piers would have had more protection.

The ultimate finding of the Court of Claims that petioner was required to perform the corrective work under the general provision in the contract as to protection of the work against cold, was therefore not sustained by the primary or evidentiary findings as to the facts. Such ulti-

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[7] The Contract provision was as follows:

"Care of Work.

"a. The Contractor shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

"b. The Contractor shall provide temporary heating, covering, and enclosures as necessary and to the satisfaction of the Contracting Officer to protect all work and material against damage by dampness and cold, to dry out the buildings properly, and to facilitate completion of the work; * * *" (R. 54-55).

mate finding may be reviewed by this Court on a writ of certiorari to the Court of Claims.[8]

Questions Presented

1. Under the Bacon-Davis Act which requires the Secretary of Labor to determine prevailing rates of wages, and requires that such rates shall be inserted in the advertised specifications, where a contractor uses such rates in estimating his bid, may the Secretary of Labor, subsequent to the execution of the contract, increase the rate previously established, and thereby require the contractor to pay the same without compensation for such increase?

2. Under the Bacon-Davis Act, where the Secretary of Labor erroneously establishes a rate of wages as the prevailing wage, lower than the actual prevailing wage, and such erroneous rate is advertised in the specifications for a Government contract, and the contractor uses such rate in estimating his bid, may the Secretary of Labor, subsequent to the execution of the contract, correct the error by increasing the rate as advertised to the actual prevailing rate and thereby require the contractor to pay the increased rate without compensation for such increase?

3. May recovery to a contractor for such compensation be denied upon the ground that the contractor requested assistance of the Secretary of Labor in a situation where its carpenters refused to work at the rate determined by the Secretary of Labor and as set forth in the contract, in response to which request, the Secretary increased the rate required to be paid?

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[8] 53 Stat. 752; U. S. C. 28:288.

"In such cases, the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned . . . that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts."

4. Where the Court of Claims finds that specific provisions in a Government contract and change order exclude work which, without such specific provisions, would be required under a general contract provision as to the care and protection of work, and where the Court of Claims also finds that such work is made necessary by reason of erroneous grades in the plans, may the contractor recover for such work?

5. Where specific provisions in a Government contract and change order exclude grading around piers, may the contractor be required to protect the piers from frost action under a general provision of the contract requiring protection of the work from cold, where the only feasible method of protection was grading around the piers?

Reasons for Allowance of Writ

1. The case involves a question of public importance, as to whether a contractor in bidding on a Government contract may rely on the rates of wages determined by the Secretary of Labor and stated in advertised specifications as required by the Bacon-Davis Act, and whether the contractor may be subjected to increased costs due to increased wage rates resulting from subsequent determinations of the Secretary of Labor.

2. The case involves an important question of Federal law which has not been decided by this Court and should be settled as to whether under the Bacon-Davis Act, the Secretary of Labor is authorized, subsequent to the execution of a Government contract, to modify his determination as to the wage rates stated in advertised specifications.

3. The case involves an important question of general and Federal law as to whether, in bidding on Government contracts, and in the performance thereof, a contractor may rely on the explicit declaration in the specifications of work

to be omitted, and whether the contractor may be directed to perform such work under a general provision in the same contract, which, if it were not for the specific declaration, would include such work.

4. The Court of Claims has decided the above question in conflict with the weight of authority and in conflict with the applicable decisions of this Court.

Petitioner therefore prays that a writ of certiorari may be granted to review the judgment of the Court of Claims of the United States and that such writ may be issued to said Court directing that all proceedings may be forwarded to this Court for review.

Dated: New York, December 16, 1947.

Respectfully submitted,

A. J. Paretta Contracting Co., Inc.,
By Emanuel Harris,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 482

A. J. PARETTA CONTRACTING CO., INC.,
Petitioner,

against

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Petitioner Is Entitled to Recover for the Increased Wages Paid to Carpenters Resulting from the Modification of the Wage Rate Subsequent to the Execution of the Contract.

Pursuant to the Bacon-Davis Act, it was the duty of the Secretary of Labor to determine the prevailing wage rate for carpenters prior to the execution of the contract, so that such wage rate could be set forth in the advertised specifications and included in the contract. Such determination was made on August 10, 1942 and the rate was fixed at $1.25 per hour (R. 35) and so set forth in the contract

(R. 29). Such rate was not only the minimum rate which required to be paid but, by reason of the Stabilization Act and Executive Order 9250, it was the only rate that could be paid.

The Court of Claims found that petitioner used such wage rate in computing its bid (R. 30).

The contract provision with respect to the payment of carpenters' wages at the rate determined prior to the signing of the contract was part of the petitioner's agreement with the Government, which was beyond the power of the Secretary of Labor to change or modify without compensation to the petitioner.

There is no decision by this Court as to the power of the Secretary of Labor under the Bacon-Davis Act to modify his prior determinations as to wage rates, subsequent to the execution of a contract.

In *U. S. for the use of Wylie* v. *Barton,* 79 F. (2d) 496, C. C. A. 4, it was held that the Secretary of Labor was without power even to postpone or defer the time when his finding as to the prevailing wage rate should become effective, and it was there said (P. 498):

> "The contractor, in accordance with the act, agrees to pay the prevailing rate of wages, that is to say, the rate prevailing while the public work is being done; *and no discretion is conferred upon the Secretary to modify or change the effect of the agreement.*" (Italics ours.)

The Court of Claims in our case stated that the contract provided that the contractor shall pay not less than the wages which the Secretary of Labor may "from time to time" determine as the prevailing wage (R. 50). The contract contains no such provision. The contract (Article 6, Par. a) provides that the contractor will pay not less than the wages specified, *i. e.* $1.25 per hour for carpenters (R. 29). The Court of Claims properly stated that such wage

as specified was based upon the last determination of the Secretary of Labor prior to the execution of the contract (R. 50-51). But the Court of Claims also stated that the only purpose of paragraph c of Article 6 of the contract was to require the contractor to pay any minimum wage that might be determined by the Secretary of Labor after the execution of the contract (R. 50-51).

Paragraph c reads:

> "The determinations of the Secretary of Labor shall be deemed to establish the minimum wages which may be paid to the designated laborers and mechanics . . ." (R. 50).

The meaning of "determinations" in the above provision must be arrived at by reference to the provisions of the Bacon-Davis Act, quoted in the accompanying petition, from which the authority of the Secretary of Labor to determine prevailing and minimum wages is derived. Those provisions refer to the setting forth in the advertised specifications for every contract to which the United States is a party the minimum wages to be paid based on the wages that will be determined by the Secretary of State to be prevailing. *There is no authority granted in the statute to the Secretary of Labor to fix different minimum wages subsequent to the advertised specifications, and there is no provision in the contract by which the contractor agrees to pay wages according to any later determination,* as stated by the Court of Claims (R. 51): The use of the plural "determinations" instead of the singular "determination" must be deemed to refer to the several classes of mechanics and laborers involved, rather than to the date of the determination.

The Court of Claims stated that the Government did not warrant that $1.25 was the prevailing wage (R. 51). Again the Court of Claims gave no effect to the provisions of the

Bacon-Davis Act which state that the minimum wages provided for in the specifications shall be based upon the wages determined by the Secretary of Labor "to be prevailing."

Moreover, the contract itself provides that the determinations of the Secretary of Labor shall be "deemed" to establish the minimum wages (Par. c, above quoted).

The Court of Claims found that there was no misrepresentation of the wage rate because the sole basis for the modification by the Secretary of Labor was that petitioner itself had been paying the higher rate on the prior contract (R. 51). Such finding was inconsistent with the Court's finding that petitioner used the rate stated in the specifications in preparing its bid (R. 30). The modification of the wage rate based solely on the fact that petitioner was paying a higher rate on a prior contract was unauthorized and clearly contrary to the statute.

The Secretary of Labor was required by the Bacon-Davis Act to determine the "prevailing" wage for the several classes of mechanics "in the city, town, village or other civil subdivision of the State in which the work is to be performed". (See quotation in petition (footnote 2) from Bacon-Davis Act.) The Court of Claims found that whereas petitioner employed 150 carpenters on the prior contract, 200 to 300 more carpenters were employed nearby in the construction plant of the Aluminum Company of America and that there was no evidence as to the wage rate paid at such other plant (R. 30). It was the duty of the Secretary of Labor to obtain the evidence as to the wage rate paid at the nearby plant, which employed the majority of carpenters in the territory (R. 30). Petitioner should not be denied its increased costs resulting from the failure of the Secretary of Labor to obtain the evidence necessary to determine the correct prevailing wage.

Moreover, the Court of Claims found that at the time the bid was prepared, petitioner had some hope that carpenters would be released from the Aluminum Company plant and from the prior contract in such numbers and such times that carpenters could be obtained at the $1.25 rate (R. 30).

In view of such findings, the acceptance by the Court of Claims of the Secretary of Labor's modification of the wage rate based solely on the fact that petitioner was paying the increased rate on a prior contract to less than the majority of carpenters employed in the territory, was clearly improper, even if the Secretary of Labor had the authority to change his prior determination.

Finally, the Court of Claims held that the Government did not warrant that the $1.25 would remain the prevailing wage, and refers to paragraph d of Article 6 in support of such ruling (R. 51).

Paragraph d reads as follows (R. 29):

> "d. The specified wage rates are minimum rates only, and the Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor."

The intent of the above provision clearly was that the contractor should have no claim for additional compensation because of the voluntary payment of any increased wages because of union demands or similar circumstances, but not because of an act of the Government.

This construction was given to such provision by the Court of Claims itself in granting judgment to petitioner herein for increased wages of laborers paid by petitioner

as a result of the direction of the Government. The Court of Claims in awarding petitioner the increased amount paid to laborers said (R. 53):

> "It is no answer to say that the contractor would probably have had to pay the increased wages anyway, that it had not been able to get the laborers to work for less, independent of the Government's demand, and that it probably would not have been able to do so in the future. This is speculation. The probabilities are that it would not have been able to get the laborers to work for less, but whether or not this is so, we do not know. *What we do know is that the activating cause of its paying the increased wages was the Government's demand upon it.*" (Italics ours.)

The Board of Contract Appeals, established by the Secretary of War [9] to hear appeals from rulings of contracting officers to the head of the Department, has consistently held under the above contract provisions that the contractor has a right to rely on the correctness of the predetermined wage rates and may recover for increased wages paid pursuant to subsequent changes made by the Secretary of Labor.

In *Northwestern Engineering Co.*, B. C. A. No. 732, 3 C. C. F. 10, 13, it is stated:

> "The Act of August 30, 1935, 49 Stat. 1011, as amended, makes specific directions. It requires that 'The advertised specifications' shall contain a provision

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[9] August 8, 1942.

"1. There is hereby constituted in the Office of the Under Secretary of War a board to be known as 'War Department Board of Contract Appeals' . . .

"3. The board created by paragraph 1 of this memorandum is hereby designated as the duly authorized representative of the Secretary of War to hear, consider and decide as fully and finally as the Secretary of War might do, appeals to the Secretary of War under contracts which contain provisions authorizing the Secretary of War to designate a board as his duly authorized representative to determine appeals."

stating minimum wages, based upon the wages that are determined by the Secretary of Labor to be prevailing. That direction is applicable to none other than the contracting agencies of the Government. Contractors have and take no part in the making up of 'the advertised specifications.' Therefore, when contracting agencies of the Government make up 'the advertised specifications', it is their duty to set forth the correct wage rates as predetermined by the Secretary of Labor. And contractors have a right to rely upon the correctness of the predetermined wage rates as set forth in the specifications.

"The statute further requires that every contract based upon these specifications shall contain a stipulation requiring the contractor or subcontractor to pay its or his laborers the full amounts of their wages computed at wage rates not less than those stated in the advertised specifications. By this the statute requires, as this Board interprets it, that contractors shall pay their laborers wage rates not less than those predetermined to be prevailing by the Secretary of Labor.

"There is no dispute that 'the advertised specifications' for the instant contract state an incorrect wage rate for unskilled laborers. The wage rate set forth in the advertised specifications had been changed by the Secretary of Labor from $.625 per hour to $.80 per hour. The change had been made previous to the time the advertised specifications were placed in the hands of this appellant. Consequently, an error had been committed, and it was committed by a governmental agency whose duty it was to state the wage rate correctly."

The Government, in advising petitioner of the adjustment made by the Secretary of Labor, stated petitioner was "permitted" to pay the increased rate (R. 35). Since under the Bacon-Davis Act petitioner was required to pay the rate prevailing at the time its contract was bid, the word "permitted" was a euphemism.

In *Northwestern Engineering Co.* (*supra*) at pages 14, 15, it is stated:

> "It is difficult to understand the direction made in paragraph numbered 2 to the effect that contractors (including appellant) may be permitted to pay the increased rate at their own expense without being considered in violation of Executive Order 9250. This may have been intended to be a gesture of generosity, probably in the realization that labor unions at the site would see to it that appellant did pay the increased rate. But this Board cannot locate the authority for the gesture made, and is unable to fathom to what extent influence could be brought to bear to prevent prosecution of appellant, in case appellant refused to pay the increased rate . . .
>
> "But we cannot subscribe to the theory that there is any sanctity to a contract, whereby the Government may insist upon its vested rights, when the Government itself, through its agents, has violated that sanctity by failing to carry out its statutory obligation to embrace in its advertised specifications, the true and accurate rates, thereby misleading contractors to compute bids inaccurately, and to their disadvantage. Such a situation is unconscionable, and should be corrected within the department where the errors occurred, without compelling complainants to pursue their remedies in the courts (See Edmund J. Rappoli Company, Inc. *v.* The United States, 98 C. Cls. 499, 1 C. C. F. 461)."

In *Blauner Construction Co.* B. C. A., No. 1315, 4 C. C. F. 50, 229, the Secretary of Labor included the correct prevailing rate in the advertised specifications, but between the time of such advertising and the date of execution of the contract, the Secretary of Labor found an increased prevailing rate. Recovery of the difference was allowed, it being stated:

> "The Bacon-Davis Act provides that the advertised specifications shall state the minimum wage rates prescribed by the Secretary of Labor at the time bids are

solicited, and that a contract based upon such specifications shall require the contractor to pay the minimum wage rates stated in the specifications. However, the purpose of the act is to require the contractor to pay the minimum wage rates prescribed by the Secretary of Labor at the time the contract is signed, and it was the obligation of the contracting officer to afford the appellant an opportunity to correct its bid before the contract was executed. Since it was the Government that changed the rates, the contracting officer must be charged with the knowledge of the action. The Board believes that if either party had known that the Secretary of Labor had increased the rates, the appellant would have been allowed to revise its bid and that the formal contract would have been based upon the increased rates. Under such circumstances, the appellant is entitled to a supplemental agreement making an appropriate price adjustment. The appeal is sustained."

In *Sanders*, B. C. A. No. 1015 3CCF 1055 an erroneous rate was set forth in the contract. Recovery was allowed for the increased cost resulting from the requirement to pay the true prevailing rate.

The Court of Claims stated that the petitioner says that the Secretary of Labor made a mistake in his determination of the prevailing wage and that having contracted upon the basis of his determination, petitioner is entitled to recover the excess amount it was required to pay (R. 50). The Court of Claims held that petitioner's position could not be maintained (R. 50). The Court made no finding that the first determination of the Secretary of Labor was an error.

In the absence of error in the first determination, there was no authority in the Secretary of Labor to change the wage rate subsequent to the execution of the contracts. *U. S. for the use of Wylie* v. *Barton, supra.*

If there was error by the Secretary of Labor in the first

determination, petitioner is entitled to recover the increased wages paid by it in reliance on such erroneous determination (cases above cited).

It is a matter of public importance that bidders on Government contracts may know whether they can rely on the wage rates advertised in the specifications as determined by the Secretary of Labor under the Bacon-Davis Act, or whether they will be subjected to increased costs due to later determinations not authorized by the Act.

II

Petitioner Should Not Be Denied Recovery Because It Requested Assistance in the Situation Arising from the Refusal of Carpenters to Work at the Rate Determined by the Secretary of Labor, and the Resulting Modification of the Wage Rate.

The Court of Claims denied petitioner's claim for the increased wages paid to carpenters upon its construction of the contract provisions (R. 50). However, the Court also stated that because of petitioner's request for assistance in solving the dilemma created by the refusal of the carpenters to work, petitioner may not make a claim against the Government based on an act done for its benefit (R. 51). The Court of Claims found, however, that plaintiff did not "affirmatively" agree to withhold claim against the Government for additional compensation in event the carpenters' wage rate was increased (R. 34), although it stated that the Government representatives "understood" that petitioner would make no claim against the Government and with this understanding induced the Secretary of Labor to modify his determination of the wage rate (R. 49).

The Bacon-Davis Act places an absolute duty on the Secretary of Labor to determine and require the payment of the prevailing wage rate and directs that such rate be included in advertised specifications.

The effect of the ruling of the Court of Claims is to give force to the refusal of the Secretary of Labor to properly perform the duty imposed by the statute unless, as a condition, petitioner waive such rights as it might have.

Not only is such ruling without legal foundation, but, as above shown, the Court of Claims found that petitioner did not "affirmatively" waive its rights (R. 34). The denial of recovery upon the ground of waive or estoppel was therefore contrary to the facts as well as the law.

Moreover, the ultimate finding that petitioner waived its claim for additional compensation because of the payment of increased wages, is not sustained by the evidentiary finding that petitioner did not agree to withhold such claim (R. 34). Such ultimate finding may be reviewed by this Court.[10]

III

The Denial by the Court of Claims of Recovery for Work Performed by Petitioner in Adjusting the Piers Was Contrary to the Established Rule That in the Construction of Contracts, Including Contracts to Which the United States Is a Party, Specific Provisions Excluding Certain Work Control Over General Provisions in the Same Contract Pursuant to Which Such Work May Be Required.

The Change Order issued to petitioner on contract 30082 for the installation of piers in anticipation of the construction of housing under the subsequent contract (30083) specifically excluded grading work (R. 40). The specifications in contract 30083 also provided that if the existing grades were lower than shown on the plans, no fill need be provided (R. 42).

The Court of Claims made a finding of fact that the only feasible method of protecting the piers against frost action was by placing earth around the piers, *i. e.*, grading

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[10] 9 U. S. C. 28:288; see petition, footnote 8.

(R. 42). The Court also found that if the grade had been as indicated on the plans, the piers would have had more protection, *i. e.*, more earth around them (R. 42).

Nevertheless, the Court of Claims held that petitioner was required to protect the piers against cold, *i. e.*, grade around the piers by providing fill and placing it around the piers, under the general provision of the contract requiring petitioner to protect the work against cold (R. 54-55).

Such ruling was contrary to the principle of law repeatedly applied by this Court that the explicit declaration in a Government contract of the work to be omitted, controls over a general provision in the same contract under which such work might otherwise be required.

U. S. v. *Smith*, 256 U. S. 11, 16;
Holleback v. *U. S.*, 233 U. S. 165;
U. S. v. *Standard Rice Co.*, 323 U. S. 106;
U. S. v. *Atlantic Dredging Co.*, 253 U. S. 1, 11.

The ruling of the Court of Claims was contrary to the established rule of law, and the applicable decisions of this Court.

It is a matter of public importance in the performance of Government contracts, that contractors may rely upon such established rule of law, so that in bidding on Government contracts, they may know that the work required of them will be as clearly stated in such contracts, that they will not be subject to increased costs for work which they have not agreed to perform.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EMANUEL HARRIS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 482

A. J. PARETTA CONTRACTING CO., INC.,
Petitioner,

vs.

THE UNITED STATES

PETITIONER'S REPLY BRIEF

I

The Government argues in its brief that the holding of estoppel, with respect to petitioner's claim based on increased wages paid to carpenters, is sustained by the evidentiary findings of the Court of Claims (Government Brief, p. 9).

It was shown in the petition herein (Pet. 20-21) that the ultimate holding of estoppel was contrary to the evidentiary finding of the Court below that petitioner did not affirmatively agree to withhold claim for additional compensation in event the carpenters' wage rates was increased (Rec. 34). It was also shown in the petition (Pet. 20-21) that the principle of estoppel could not affect the duty of the Secretary of Labor under the Bacon-Davis Act to correctly determine the prevailing wage rate or limit the petitioner's right to rely on the proper performance of such duty.

II

The Government's contention that the original determination of the Secretary of Labor as to the carpenters' wage rate did not mislead petitioner (Gov't Brief, Page 9) is contrary to the finding of the Court below that petitioner used such rate in preparing its bid (R. 30) and it is also contrary to the contract provision that the wage rates specified therein shall be "deemed" to establish the minimum wages (R. 50), *i. e.*, the "prevailing" wages as required to be determined by the Bacon-Davis Act (Pet. 2, footnote 2).

It is stated in the Government's Brief (p. 11) that petitioner's claim is based on the assumption that the first determination of the prevailing wage rate by the Secretary of Labor was erroneous, and that such assumption is not supported by the finding of the Court below. This is not a correct statement of petitioner's position as stated in the petition (Pet. 19, 20). In the absence of error in the first determination, there was no authority in the Secretary of Labor to change the wage rate subsequent to the execution of the contracts. If there was error in the first determination, petitioner is entitled to recover the increased wages paid by it in excess of the rate prescribed in the first (or erroneous) determination, upon which it relied.

III

It is admitted in the Government Brief that petitioner was not required to provide fill for the purpose of changing the grade, and that providing fill was the only feasible method of protecting the piers against damage by cold (Gov't Brief, p. 14). Nevertheless, the Government argues in its brief, that under the general contract provision for protecting the work against damage by cold, petitioner was under a duty to provide fill not as "grading" but as "protection" (Gov't Brief, p. 14). Such a hair-splitting

result is contrary to the well-established principle discussed in the petition (Pet. 22) and not answered by the Government in its brief, that the explicit declaration in a Government contract of work to be omitted controls over a general provision in the same contract under which such work might otherwise be required. If there were no other reason for granting the writ herein, the situation on this item alone, as sought to be so tenuously distinguished by the Government, is sufficiently compelling to enforce the above principle so often applied by this Court, as shown by the cases cited in the petition (Pet. 22), with which decisions the judgment of the Court below is clearly in conflict.

IV

The Government seeks in its brief to escape the weakness of its position on petitioner's claim for compensation for the corrective work on the piers by the argument that petitioner failed to invoke the appeal provisions of Article 15 of the contract (R. 46) and was therefore precluded from raising this question in the Court below (Gov't Brief, p. 14).

In answer thereto it may first be stated that the dispute on this item involved the interpretation of the contract, which was a question of law and not a question of fact under Article 15 of the contract. Disputes as to questions of law were not required to be submitted to the contracting officer and head of the department before resort may be had to the Courts. Indeed, the Court below expressed and applied this principle in granting recovery to petitioner on its claim for increased laborers' wages (R. 53-54).

The Court below stated that "only disputes concerning questions of fact was the plaintiff required to submit to the contracting officer" (R. 53-54).

It is to be noted that the Government states in its brief (pages 6-7, footnote 1) that it did not consider petitioner's alleged failure to obtain a ruling from the contracting offi-

cer or to appeal to the head of the department on petitioner's claim for increased laborers' wages "of sufficient significance to warrant seeking a review by this Court."

The cases cited in the Government Brief on this point are inapplicable. In the cases of *U. S.* v. *Holpuch*, 328 U. S. 234, and *U. S.* v. *Blair*, 321 U. S. 730, Article 15 of the contract included all disputes "concerning questions arising under this contract" whereas, in our case, Article 15 refers only to disputes concerning questions of fact (R. 27).

In fact, petitioner did request findings of fact by the contracting officer, not only on petitioner's claim as to the piers, but also on petitioner's claim for the increased carpenters' wages (R. 32-33, 44-46). The contracting officer failed to make any findings, and merely denied petitioner's claims (R. 32, 35, 46). Petitioner was not required to appeal to the head of the department, before instituting suit, for several reasons as hereafter stated.

In the first place, there were no findings of fact from which an appeal could be taken.

Manufacturers Casualty Ins. Co. v. *U. S.*, 105 C. Cls. 342;

Ericcson v. *U. S.*, 104 C. Cls. 397, Cert. den. 327 U. S. 784.

The claims involved interpretations of the contract and applicable statutes and were therefore disputes as to questions of law and not as to questions of fact.

B. W. Construction Co. v. *U. S.*, 97 C. Cls. 92;

McShain v. *U. S.*, 88 C. Cls. 284, 299;

Green v. *Foundation Co.*, 180 Misc. 976, 44 N. Y. S. (2d) 547;

Randall Construction Co. v. *U. S.*, 2 C. C. F. 920, BCA #537, June 29, 1944.

The material facts are undisputed.

St. Louis Shipbuilding Steel Co., 4 C. C. F. 50, 272 BCA #177, June 14, 1946.

The burden was on the Government to show that the decision of the contracting officer was based on disputed facts and not on the law.

U. S. v. *Johnson*, 153 F. (2d) 846 (C. C. A. 9).

Conclusion

This case presents for consideration the important question as to the authority of the Secretary of Labor under the Bacon-Davis Act to modify his determinations as to prevailing wage rates incorporated in Government contracts and whether recovery may be had where damage is suffered by reason of reliance upon an erroneous determination by the Secretary of Labor, which questions have not heretofore been decided by this Court.

The case also presents a situation in which the Court of Claims has interpreted the provisions of a Government contract in conflict with the applicable decisions of this Court as to the effect to be given to a specific or express declaration in a Government contract of work to be omitted as against a general provision therein under which such work might otherwise be required.

These questions are of great public importance to contractors and to the Government in the bidding and performance of Government contracts.

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

EMANUEL HARRIS,
Counsel for Petitioner,
270 Broadway,
New York 7, N. Y.

Dated: February, 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 482

A. J. PARETTA CONTRACTING CO., INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 48–55) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 6, 1947 (R. 55). The petition for a writ of certiorari was filed on December 17, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether a contractor may recover from the Government for increased wages paid to carpen-

ters who had refused to work for $1.25 an hour, the minimum contract rate based on a determination by the Secretary of Labor of the prevailing wage rates, where the contractor was prohibited from paying more than the prevailing wage rate because of wage stabilization orders, and where the Secretary of Labor modified his determination of the prevailing wage rate for carpenters by increasing it to $1.35 at the contractor's request and on the understanding that no claim against the Government was to be made for additional compensation on account of the increased labor costs.

2. Whether a contractor with the Government who was required by one of the general conditions of the contract to protect all work and material from damage by cold, is relieved of that requirement as to piers erected under the contract, where the only feasible method of protecting them from frost action was by placing earth around them, and where under the specifications relating to excavating and grading the contractor need not provide fill.

STATUTE, EXECUTIVE ORDER, AND CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the Davis-Bacon Act, as amended, Executive Order No. 9250, and Contract NY–30083 are set forth in the Appendix, *infra*, pp. 16–18.

STATEMENT

Petitioner instituted this action in the Court of Claims on April 2, 1945, to recover compensation

on three items of claim arising out of certain contracts entered into between petitioner and the National Housing Agency, Federal Public Housing Authority (R. 1–25). Item II of the claim was withdrawn, leaving only Items I and III for determination by the court (R. 27).

ITEM I

On June 9, 1942, petitioner entered into contract NY–30082 with the National Housing Agency, Federal Public Housing Authority, for the construction of housing at Massena, New York (R. 26). Article 17 of this contract, which embodied the terms of the Davis-Bacon Act, as amended, *infra*, pp. 16–17, required the contractor to pay wages computed at rates not less than those stated in the specifications, those rates being based on a determination by the Secretary of Labor that they were the prevailing wage rates in the particular locality (R. 20, 27–28, 29). For journeymen carpenters the minimum hourly wage rate, as fixed by the specifications, was $1.25 (R. 29). Petitioner's subcontractor handling the carpentry work on this contract consistently paid carpenters at the hourly rate of $1.35 instead of $1.25, however, and when petitioner later took over the carpentry work from the subcontractor it continued to pay carpenters at the higher rate (R. 30).

On December 2, 1942, petitioner entered into a

second contract, NY–30083, for the construction of additional housing at Massena, N. Y., with provisions requiring the payment of minimum wages identical with those in the first contract (R. 27–29). In computing estimates for its bid on this contract, petitioner used a wage rate of $1.25 per hour for carpenters, petitioner having some hope that carpenters would be released from other large construction projects in such numbers that they could be obtained at this rate for the work under the second contract (R. 30). Carpenters began work on this project on December 23, 1942, continuing to work intermittently until the latter part of February 1943, all being paid by petitioner at the hourly rate of $1.35 (R. 30).

Meanwhile, the President, on October 3, 1942, acting under the authority of the Stabilization Act of 1942 (56 Stat. 765; 50 U. S. C. App., Supp. V, 961–971) had by Executive Order No. 9250 (7 F. R. 7871) "frozen" wages at the rates prevailing on September 15, 1942, and prohibited any increase or decrease in wages which was not approved by the National War Labor Board. Thereafter, on February 23, 1943, petitioner advised the carpenters' union that under Executive Order No. 9250 it could not pay more than $1.25 per hour on Project NY–30083 (R. 31). Upon receiving this advice the carpenters refused to work at that rate and stopped work on the project (R. 30–31).

After some negotiation, petitioner's president and secretary conferred in May 1943, with an official of the Federal Public Housing Authority, who advised that he would go with them to see an official of the Wage Determination Section of the Department of Labor and attempt to obtain a modification of the wage rate quickly, if they would agree that there would be no increased cost to the Government by reason of such modification (R. 34). This was in accord with the policy of the Labor Department (R. 35). The alternative was to apply to the Wage Adjustment Board for an increase in the wage rate, a procedure which would have required a longer period of time before a decision could have been obtained (R. 34). Petitioner's representatives led these Government officials to believe they had agreed that there would be no increase in the cost of the project to the Government if the wage rate should be increased, but they did not affirmatively commit themselves to withhold claim for additional compensation in such event. They knew, however, that they had created this impression and did not correct it. (R. 34.) As a result of this conference, the Secretary of Labor modified his determination of August 10, 1942, by substituting $1.35 for $1.25 as the prevailing wage rate per hour for carpenters (R. 35). Petitioner was informed of this modification by telegram of June 4, 1943 (R. 35). Thereupon petitioner employed carpenters

at $1.35 per hour and proceeded with the work under the contract, in the course of which it paid $3,662.30 more for the wages of journeymen carpenters than it would have paid had the hourly rate been $1.25 (R. 36).

On these facts the court below held that the United States was not liable for the increased costs resulting from the payment of the higher wages, and accordingly refused to allow a recovery on this portion of Item I of petitioner's claim (R. 47, 48–52).[1]

[1] The remaining portion of Item I was based on the payment of an increased wage rate to common laborers. The contract minimum rate was 65¢ per hour, which was the rate fixed by the Secretary of Labor as the prevailing wage rate (R. 36). On February 9, 1943, this rate was increased by the Wage Adjustment Board to 80¢ per hour (R. 36–37). This ruling amounted to no more than permission to pay 80¢ per hour and was not a requirement that petitioner do so. *Employees Group of Motor Freight Carriers* v. *National War Labor Board*, 143 F. 2d 145 (App. D. C.), certiorari denied, 323 U. S. 735. When petitioner refused to pay the higher rate, a subordinate of the contracting officer, acting without authority, advised that this refusal was a noncompliance with the terms of the contract and threatened to report the matter to the Department of Labor (R. 39). Petitioner thereafter paid the increased wages without appealing to the contracting officer or the head of the department. Judgment was entered for $2,659.47 for the increased wages so paid. (R. 40, 47.) While we believe that this was error, in that the court below held the Government liable because of the act of a subordinate official which was clearly unauthorized, especially since petitioner made no effort under Article 15 of the contract to obtain a ruling from the contracting officer or to appeal to the head of the department concerned, we did not consider that this apparently isolated departure from the rule

Item III

The piers for 31 of the 35 buildings to be constructed under the second contract, NY–30083, were erected by petitioner between October 26 and November 26, 1942, and in intermittent working periods during December 1942 (R. 41).[2] It was anticipated that the foundations for the project could be completed before cold weather set in, and that work on the superstructures could go forward during the winter (R. 41). However, little progress was made on the superstructures, as petitioner laid girders on the piers for only five buildings (R. 41). The Government granted extensions of the contract time to cover all delays (R. 42).

The piers were inserted 3½ feet in the ground at the natural grade, which was later found to be somewhat lower than indicated on the plans (R. 42). In the absence of superstructures being placed on them, the only feasible method of protecting them against frost action would have been by placing earth around them (R. 42). If the grade had been as indicated in the drawings the

announced by this Court in *United States* v. *Holpuch Co.*, 328 U. S. 234, 239, and *United States* v. *Blair*, 321 U. S. 730, 735, was of sufficient significance to warrant seeking a review by this Court.

[2] This work was begun under Change Order No. 20 to the first contract, NY–30082, in anticipation of the execution of the second contract, in order that construction of the superstructures might begin as soon as the second contract was executed (R. 40–41).

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piers would have had more protection (R. 42). Petitioner did not grade or place fill around the piers, except to backfill earth removed in excavating (R. 42). During the winter frost action tilted approximately half of the piers out of line (R. 42). Petitioner realigned the piers, the fair and reasonable price of the work done being $11,500.93 (R. 46). Petitioner claimed additional compensation for this work on the ground that placing earth around the piers was the only feasible method of protecting them from frost, that under the specifications to contract NY–30083 it was not required to provide fill and that there was no specific provision in the change order under which this work was done requiring it to protect or maintain the piers pending the placing of the superstructures on them (R. 42, 45–46). There was, however, a general condition in both contracts requiring petitioner to protect all work and material against damage from dampness and cold, and because of this provision the court below held that petitioner could not recover the expense of resetting the piers (R. 42, 47, 54–55).

ARGUMENT

In connection with its claim under Item I, petitioner contends that the first determination of the Secretary of Labor as to the prevailing wage rate was erroneous, and that it misled petitioner to its detriment, and that the subsequent modification of that determination increasing the

rate entitles it to recover the increased wages paid by it. Petitioner further contends that the court below erred in holding that it had waived, or was estopped to assert, its claim for additional compensation based on the payment of increased wages. (Pet. 7, 20–21.) We submit that the holding of estoppel is fully sustained by the evidentiary findings of the court below, and that the original determination of the Secretary of Labor as to the prevailing rates did not mislead petitioner to its detriment.

(a) With regard to the conference between petitioner's representatives and the officials of the Federal Public Housing Authority and the Department of Labor, the court below found that petitioner's representatives did not affirmatively agree to withhold claim for additional compensation should the carpenters' wage rate be increased, but found further that "Neither did they at that time affirmatively correct the impression, which they knew was held by both the Assistant Director and the Assistant Solicitor, that they had agreed that the wage-rate increase would not result in added cost to the Government" (R. 34). The court below found also that it was the policy of the Labor Department to correct wage-rate determinations only in cases in which it appeared that such correction did not involve additional cost to the Government for construction on which such wage rates were to be paid and that, where such additional cost was involved, the question

was referred to the Wage Adjustment Board for appropriate action (R. 35). In such circumstances petitioner's representatives, having created a false impression that they agreed to withhold a claim (based on increased wages), were clearly under a duty to correct that impression before the officials of the Government had acted in reliance upon it. The finding of the court below that they did not do so, which finding is not questioned, is sufficient to estop petitioner from contending now that there was no agreement to waive the claim for excess costs, under the familiar rule that one who by his acts or representations, or by his silence when he ought to speak out, induces another to believe certain facts to exist, is estopped to deny the existence of such facts where the latter, having acted on such belief, would be prejudiced by such denial. *Gregg* v. *von Phul,* 1 Wall. 274, 281; *Dustin Grain Co.* v. *McAllister,* 296 Fed. 611 (C. C. A. 8); *Crane Co.* v. *James McHugh Sons, Inc.,* 108 F. 2d 55, 59 (C. C. A. 10); *In re Walton Hotel Co.,* 116 F. 2d 110 (C. C. A. 7).

(b) Petitioner was not misled as to its prospective labor costs by the original determination of the prevailing carpenter wage rates by the Secretary of Labor. To avoid the effect of the estoppel, petitioner contends that "The effect of the ruling of the Court of Claims is to give force

to the refusal of the Secretary of Labor to properly perform the duty imposed by the statute unless, as a condition, petitioner waive such rights as it might have" (Pet. 21). This contention is based on the assumption that the first determination of the prevailing wage-rate by the Secretary of Labor was erroneous and that, therefore, petitioner was entitled as a matter of right to have that determination corrected. As petitioner itself recognizes, however, this assumption is not supported by any finding of the court below (Pet. 19).

Petitioner's dilemma arose out of the fact that it had been paying carpenters working on Project NY-30082 $1.35 per hour, which was more than the minimum rate required to be paid by that contract, and that thereafter they refused to work for less than $1.35 per hour on the second project, even though wartime wage stabilization legislation then prohibited the payment of more than the minimum rate (R. 30-31). The ordinary method of dealing with such problems was to apply to the Wage Adjustment Board for an increase in the wage rate, where a decision could be obtained in two or three months. Petitioner declined to participate with the carpenters' union in such an effort. (R. 34.) Instead, almost three months after the work stoppage began, petitioner sought the aid of the Assistant Director of the Labor

Relations Division of the Federal Public Housing Authority, and was told that the situation might be taken care of quickly by a modification of the Secretary of Labor's finding as to the prevailing wage rate, on condition that petitioner agree that there would be no increased cost to the Government by reason thereof (R. 34). Since Executive Order No. 9250 "froze" wages at the September 15, 1942, level, which, with respect to the carpenters in the Massena area, was fixed by the Secretary of Labor's determination of August 10, 1942, the proposed modification of that determination would solve petitioner's problem by changing the basis for the "freezing" provision of the executive order, thereby making it possible for petitioner to pay the higher rate without violating Section 5 (a) of the Stabilization Act of 1942, 56 Stat. 767, 50 U. S. C. App. 965 (a), under which Executive Order No. 9250 was issued. When petitioner's representatives intimated that they agreed to the condition in the proposal, the modification was made (R. 34–35).

Certainly, there was nothing about this procedure which misled petitioner. Although the court below found that petitioner used the $1.25 per hour rate in preparing its bid on the second contract, it also found that petitioner at that time had some hope that carpenters would be released from other work at such times and in such num-

bers that they could be obtained for the second contract at the $1.25 rate (R. 30). Petitioner knew, however, that it had been paying $1.35 per hour regularly to its carpenters on the first contract in the same community, and by using the $1.25 rate in preparing its bid on the second contract, it deliberately took the risk of being able to procure carpenters to work for that wage. It was a business gamble, and petitioner lost, because the carpenters refused to work for less than $1.35 per hour (R. 30–31). Having lost on its gamble, petitioner may not now pass its loss on to the Government.

2. Petitioner contends in connection with Item III of its Claim, that it is entitled to recover compensation for the cost of realigning piers which had been displaced by frost action. However, there is no question that petitioner was required by the contract to "* * * provide temporary heating, covering, and enclosures as necessary * * * to protect all work and material against damage by dampness and cold * * *" (R. 42.) The court below found that in the absence of superstructures being placed on the piers, the only feasible method of protecting them against frost action would have been by placing earth around them (R. 42). Petitioner asserts (Pet. 21–22) that to do this would have required it to provide fill, and that the necessity of grading as such was excluded from the contract by a

paragraph of the specifications which provided (R. 42):

> (f) Grade areas under buildings to levels shown on plants [sic]. If existing grades are lower, no fill need be provided. * * *

Undoubtedly this provision in the specifications relieved petitioner of any obligation to provide fill merely for the purpose of changing the grade. However, it does not follow that this provision also relieved petitioner of the positive obligation to protect all work against damage by cold, merely because the only feasible method of furnishing such protection was by providing fill. In such circumstances, providing fill is not grading as such but is furnishing protection from frost. The holding of the court below that it was the duty of petitioner to provide such protection is not in conflict with any of the cases cited by petitioner (Pet. 22), and is, we submit, entirely correct. Moreover, petitioner failed to invoke the appeal provisions of Article 15 of the contract (R. 46) and was thus precluded from raising this question in the Court below. Cf. *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61; *United States* v. *Holpuch Co.*, 328 U. S. 234, 240.

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decision. The

petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Acting Assistant Attorney General.
PAUL A. SWEENEY,
JOHN R. BENNEY,
ALVIN O. WEST,
Attorneys.

JANUARY 1948.

APPENDIX

1. The pertinent provisions of the Davis-Bacon Act of March 3, 1931, as amended, c. 411, 46 Stat. 1494; 49 Stat. 1011; 54 Stat. 399; 40 U. S. C. 276a, are as follows:

> The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, or the Territory of Alaska, or the Territory of Hawaii in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly

upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, * * *.

2. Executive Order No. 9250, 7 F. R. 7871, provides in part:

TITLE II—WAGE AND SALARY STABILIZATION POLICY

1. No increases in wages rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases.

2. The National War Labor Board shall not approve any increase in the wage rates prevailing on September 15, 1942, unless such increase is necessary to correct maladjustments or inequalities, to eliminate substandards of living, to correct gross inequities, or to aid in the effective prosecution of the war.

* * * * *

3. The specifications of contract NY-30083 provided in part as follows:

6. Rates of Wages.

a. There shall be paid each mechanic or laborer of the Contractor or any subcontractor engaged in work on the project under the Contract in the trade or occupation listed below, not less than the hourly wage

rate set opposite the same, regardless of any contractual relationship which may be alleged to exist between the Contractor or any subcontractor and such laborers and mechanics.

Under Division 2—Excavating and Grading—Section 7:

(f) Grade areas under buildings to levels shown on plants [sic]. If existing grades are lower, no fill need be provided. * * *.

4. The general conditions of contracts NY-30082 and NY-30083 contained the following provisions:

CARE OF WORK

a. The Contractor shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

b. The Contractor shall provide temporary heating, covering, and enclosures as necessary and to the satisfaction of the Contracting Officer to protect all work and material against damage by dampness and cold, to dry out the buildings properly, and to facilitate completion of the work: * * *

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